



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2003

Mr. Lee Veness
County and District Attorney
Ellis County
1201 North Highway 77, Suite B
Waxahachie, Texas 75165-5140

OR2003-6437

Dear Mr. Veness:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 187596.

The Ellis County Sheriff's Office (the "Sheriff") received a request for copies of information relating to disciplinary actions and complaints against a named peace officer formerly employed by the Sheriff. You assert the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

First, we address your arguments under section 552.108 of the Government Code. The relevant part of this provision provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(2), (b). A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986) (law enforcement agency must explain how release of particular records or parts thereof will interfere with law enforcement or prosecution). Based on your representations and our review of the submitted information, we find that most of it concerns a criminal investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). Therefore, we conclude that the Sheriff may withhold the information we have marked under section 552.108(a)(2) of the Government Code.

We note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered basic information). Thus, in accordance with section 552.108(c), the Sheriff must release basic information contained in the documentation it may withhold under section 552.108(a)(2) of the Government Code.

Next, we address the applicability of the Sheriff's other claimed exceptions to information which is subject to release, including basic information. Section 552.102 excepts from

disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This provision encompasses the doctrine of common-law privacy. Accordingly, we address your privacy arguments under sections 552.101 and 552.102 together.

The doctrine of common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual’s criminal history, when compiled by a governmental body, see Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the submitted information, we find that, even if a portion of it could be considered highly intimate or embarrassing, it is of legitimate public concern. See Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); see also Open Records Decision Nos. 484 (1987) (public’s interest in knowing how police departments resolve complaints against police officers ordinarily outweighs officers’ privacy interest), 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we conclude that the Sheriff may not withhold any of the information at issue under sections 552.101 and 552.102 on the basis of common-law privacy.

Next, you claim the submitted documents contain information governed by section 1701.454 of the Occupations Code. Section 1701.452 requires a law enforcement agency to submit a report to the Commission on Law Enforcement Officer Standards and Education regarding an officer licensed under chapter 1701 who either resigns from the law enforcement agency or whose appointment with the law enforcement agency is terminated. *See* Occ. Code § 1701.452. Section 1701.454 provides, in relevant part, as follows:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. After reviewing the submitted information, we do not find the type of document contemplated by section 1701.452 of the Occupations Code. Therefore, the Sheriff may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Further, you inform us that the submitted information pertains to a peace officer who is no longer employed the Sheriff, but rather another law enforcement agency. The protections of section 552.117(a)(2) only apply to information that the Sheriff holds in its capacity as the current employer of the peace officer to whom the information pertains. Section 552.1175, which also applies to active peace officers,¹ is the applicable exception under these circumstances and provides, in part, as follows:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Though you state that the peace officer at issue has not consented to release of his personal information, you do not inform this office, nor does any of the submitted information indicate, whether the peace officer has elected confidentiality for information about himself in accordance with subsections 552.1175(b)(1) and (2). *See, e.g.,* Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of

¹ A peace officer is defined by article 2.12 of the Code of Criminal Procedure.

Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until that governmental entity receives a section 552.1175 notification). If the peace officer has elected confidentiality under section 552.1175, then the Sheriff must withhold the information we have marked in accordance with section 552.1175. If not, then the Sheriff may not withhold the information under this provision.

In the event section 552.1175 is inapplicable to the marked information, the Sheriff may be required to withhold the information under subsection 552.117(a)(1) of the Government Code. Subsection 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information if the former employee to whom the information pertains timely requested confidentiality for the information under section 552.024.² *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117 must be determined at the time that the governmental body receives the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the former employee requested confidentiality for the marked information under section 552.024 before the Sheriff received the request for the information, then the Sheriff must withhold the information we have marked under subsection 552.117(a)(1). The Sheriff may not withhold the marked information under subsection 552.117(a)(1) if the former employee did not make a timely election under section 552.024 to keep the information confidential.

Finally, we note that if neither section 552.1175 nor 552.117(a)(1) apply, then the social security social security number in the submitted information may be confidential under federal law. A social security number may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the responsive records subject to release is confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 and the referenced federal provision. However, we caution the Sheriff that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the Sheriff pursuant to any provision of law enacted on or after October 1, 1990.

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified as an amendment to Gov't Code § 552.117).

In summary, with the exception of basic information, the Sheriff may withhold the information we have marked under section 552.108 of the Government Code. If applicable, the Sheriff must withhold the peace officer's personal information, which we have marked, under either section 552.1175 or 552.117 of the Government Code. If section 552.1175 or 552.117 does not apply, the Sheriff may be required to withhold the social security number under section 552.101 in conjunction with federal law. The Sheriff must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Christen Sorrell".

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 187596

Enc: Submitted documents

c: Mr. Joseph R. Gallo
Attorney at Law
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(w/o enclosures)